BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the Supreme Court of Michigan is reported in 307 Mich. 596, and incorporates by reference the opinion in a companion case, *People* v. *Roxborough*, 307 Mich. 575.

The opinion of the trial court in denying the motions made for a new trial is unreported, and appears in the record, pp. 64-78.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Section 344).

III.

Statement of Case.

A summary statement of the case has already been made in the Petition for a Writ of Certiorari under heading I, which is hereby adopted and made a part of this brief.

IV.

Specifications of Error and Summary of Argument.

The Michigan Supreme Court erred in holding that the misuse of the 325 peremptory challenges available to the people under Section 17305, Compiled Laws of 1929, by the prosecuting attorney in excluding all qualified Negro veniremen (more than 30) from the trial jury solely because of race or color, did not deprive petitioner of due process and

equal protection of the law as guaranteed him by Section 1, 14th Amendment to the Constitution of the United States.

Argument.

At the outset we face the apparent difficulty that the record does not show that the objections of petitioner to the misuse of the 325 peremptory challenges available to the people by the prosecuting attorney were raised in the trial court, but it does show that they were raised on appeal to the Michigan Supreme Court although mistakenly based on the 6th Amendment instead of the 14th Amendment to the Constitution of the United States.

See petitioner's Assignment of Errors, No. 47 (R. 43).

The record does show moreover that there were objections to the procedure and practice of the prosecuting attorney in the use of his peremptory challenges raised early before the trial court by Motion for Mistrial filed by 6 co-defendants as the trial began (R.), by Motions for New Trial filed by 4 co-defendants (R.), and by Supplemental Motion for New Trial filed by petitioner's co-defendant Roxborough, supported by the Williams affidavit (R. 60). It is true that the Roxborough supplemental motion was inadvertently predicated on the 6th Amendment instead of the 14th; but in the Michigan Supreme Court the constitutional objection was squarely bottomed on the 14th Amendment.

See Roxborough Brief, p. 46; Roxborough Answer Brief, p. 14.

The Michigan Supreme Court was not misled by the references to the 6th Amendment, but considered and decided the case with reference to the 14th Amendment.

See opinion in *People* v. *Roxborough, supra,* 307 Mich. 575, 588, 594; incorporated in the opinion of the court in the instant case, 307 Mich. at 609.

It considered the objections on their merits and decided the question against the claim of constitutional rights.

See opinions cited *supra*.

Since the Michigan Supreme Court did consider and decided the constitutional question on its merits, petitioner has his right of review in this Court,

Sully v. *American Natl. Bk.*, 178 U. S. 289, 44 L. ed. 1072

even though the question was inexpertly drawn.

Cf. *Pyle* v. *Kansas*, 317 U. S. 213, 87 L. ed. 214.

Likewise this Court is not bound by the finding of the Michigan Supreme Court as to the effect of the Williams affidavit (R. 62).

See 307 Mich., loc. cited, at p. 594.

Where the conclusion of law of a State court as to a Federal right and its findings of fact are so intermingled that effective review requires this Court to inquire into both the facts and the law, this Court will reexamine the facts.

Norris v. *Alabama*, 294 U. S. 587, 589-590, 79 L. ed. 1074.

The instant case and its companion case, the *Roxborough* case, are the only cases counsel has been able to find where it could be established that a Negro has been deprived of due process and the equal protection of the law by a persistent and extended abuse of peremptory challenges by the prosecuting attorney in the process of empaneling the trial jury. Usually the unconstitutional discrimination has been effected in the exclusion of Negroes from the panel or jury list. The Michigan Supreme Court in the *Roxborough* opinion noted this distinction:

> "In the instant case we are solely concerned with the exercise of peremptory challenges by the people, and not with the selection of members of the jury by the

> jury commission, as was the situation in Norris *v.* Alabama, 294 U. S. 587, 79 Law Ed. 1074, and Hill *v.* Texas, 316 U. S. 400, 86 Law Ed. 1559, where showing was made that members of the Negro race were systematically excluded from the jury lists either by law or administrative practice." (307 Mich., loc. cited, at p. 590-1).

The Michigan Supreme Court, however, completely failed to appreciate that the action of the prosecuting attorney in this case amounted in substance to a revision of the jury panel by the prosecuting attorney expurgating all Negroes from the panel solely because of race, through the power lodged in his hands by the 325 peremptory challenges allocated to the people by Section 17305 *supra*. The effect is exactly the same, so far as petitioner is concerned, as if the Negroes had never been included in the panel by the jury commissioners. From petitioner's standpoint the presence of Negroes on the jury panel was a mere pretense—a shadow, without substance of right.

The moment of the unconstitutional discrimination is of no significance; the constitutional protection covers all steps through the formation of the trial jury which is to sit and determine the case; and it is immaterial what state functionary has perpetrated the discrimination.

See *Ex Parte Virginia*, 100 U. S. 313, 25 L. ed. 667.

It is therefore our contention that where it is plainly established that all qualified Negro veniremen have been excluded from the trial jury solely because of race by the prosecuting attorney's taking advantage of a prodigal number of peremptory challenges available to him (here 325), petitioner has been deprived of due process and equal protection of the law under the 14th Amendment just as decisively as if Negroes had been excluded from the panel.

Norris v. *Alabama, supra:*

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles. The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised." Per Black, J., in Smith *v.* Texas, 311 U. S. 128, 130, 85 L. ed. 84.

This principle we contend for does not do violence to the basic principles underlying the use of peremptory challenges. For purposes of this argument we can concede the contention of the Michigan Supreme Court that the normal function of a peremptory challenge is to reject, rather than select; that its express purpose is to give a party freedom of rejection with the necessity of assigning cause.

We do not contend that even in the face of suspicion as strong and apparent as in the instant case the defense could have put the prosecuting attorney on the witness stand and catechized him on his use of his peremptory challenges in order to bring out that he was using same to exclude all qualified Negro veniremen solely because of race. Normally in such a situation the matter would be left: guilty but not proved. But we do most earnestly contend that if the defense is able to establish *aliunde* as a fact that the prosecuting attorney used a prodigal number of peremptory challenges to exclude every qualified Negro venireman solely because of race, then his action is subject to the same constitutional objections as if the exclusion had been effected by jury commissioners in excluding Negroes from the panel altogether.

Petitioner does not contend he has a right to have Negroes sit on his jury, but he does have constitutional protection against their being totally excluded as a class solely because of the race or color.

Carter v. *Texas,* 177 U. S. 442, 44 L. Ed. 839;
State v. *Peoples,* 131 N. C. 784, 42 S. E. 814;
State v. *Logan,* 341 Mo. 1164, 111 S. W. 2d 110.

The Williams affidavit cannot be brushed aside as lightly as the Michigan Supreme Court has treated it. The meeting between Williams and the prosecuting attorney was no chance contact. Williams, a newspaper man, makes oath that he had a conference with the prosecuting attorney, and the admissions of the prosecuting attorney were made in this conference. Suppose the prosecuting attorney had issued a formal statement to the Detroit dailies containing the same admission that he made to Williams: that "practically every Negro in Detroit is a number or policy player anyhow, and *as such is unfit to serve on a case involving such matters*" (R. 63; italics ours). There is no doubt that such a statement would have been branded a libel on a race. By the Census of 1940 there are 149,119 Negroes in Detroit.* The statement of the prosecutor has gone beyond individual censure and has smeared an entire race. Basically it is this belief that all, or practically all, Negroes in Detroit are number or policy players that moved him to strike all Negro veniremen by peremptory challenges. True, in his statement to Williams the prosecuting attorney asserts that "the Roxborough-Watson interests are so wide that I prefer not to have any Negroes on the jury." (We deny there is any Roxborough-Watson interest in the premises.) But the prosecuting attorney did not rest there; he proceeded to his basic reason that "further *practically every* Negro in Detroit is a number or policy player any-

* Population Bulletin for Michigan (2nd Series), 16th Census.

how, and as such is *unfit* to serve on a case involving such matters" (italics ours). In every case of exclusion of Negroes solely because of race or color the exclusion had its rationale in some supposed racial characteristic: instability, lack of reasoning power, personal repulsiveness, carriers of disease, inferior caste, etc. The basic point is that here the prosecuting attorney branded the Negro race in Detroit as a whole with being number or policy players, and struck them from the jury because of this "racial" trait.

The Williams affidavit stands on the record uncontradicted, uncontroverted, unexplained. This Court has repeatedly held that circumstances more faintly indicating racial discrimination than the Williams affidavit established a prima facie case, throwing on the people the burden of explanation.

> "We thought (in Pierre *v.* Louisiana, 306 U. S. 354) as we think here that had there been evidence obtainable to contradict the inference to be drawn from this testimony, the State would not have refrained from introducing it." Per Stone, C. J., in *Hill* v. *Texas,* 316 U. S. 400, 405, 86 L. Ed. 1559.

On the record the conclusion is inescapable that the State through its prosecuting attorney deliberately and arbitrarily excluded from the trial jury all qualified Negro veniremen solely because of race, and through the 325 peremptory challenges available to it excluded all possibility of a qualified Negro sitting on this jury.

No amount of sophistry can distinguish the discrimination by jury commissioners in the exclusion of Negroes from jury lists, as in *Hill* v. *Texas, supra,* from the discrimination practiced in this case. In neither case could any amount of effort by petitioner have possibly obtained a Negro juror. In the *Hill* case they never got on the list; in the instant case they were stricken as fast as they were called by the

prosecuting attorney pulling out one of his sheaf of 325 peremptory challenges.

It cannot be argued that there was any equality of footing between the people and petitioner with respect to the peremptory challenges, from the fact that defendants had in aggregate the same number (325) of peremptory challenges which the people had. Each defendant had but 5 peremptory challenges to be exercised independently by him. The information on its face shows how diverse and antagonistic the interests of the 65 defendants were: city officials, police officers, private citizens; represented by 16 different lawyers (R. 48). So far as petitioner is concerned he had 5 peremptory challenges while the people had its side of the scale loaded with 325 peremptory challenges. The prosecuting attorney was thus enabled to and did exclude arbitrarily all qualified Negro veniremen as a class solely because of their race or color. A more flagrant violation of petitioner's right to equal protection of the law as guaranteed him by Section 1 of the 14th Amendment could hardly be imagined.

Let us grant that a case like the instant case will seldom arise because of difficulties of proof. That, however, is no answer to the instant case where substantial and adequate proof has been made. Difficulty of proof must not be permitted to emasculate the fundamental law. The very novelty of the situation is reason enough for this Court to set its stamp of disapproval on the tactics used before they become established as an effective subterfuge for avoiding constitutional restraints.

> "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand." Per Black, J., in Smith *v.* Texas, *supra*, at p. 132.

This overloading of the people with peremptory challenges where two or more defendants are jointly tried does

not have the sanction of immemorial custom in Michigan. From the time of the Revised Statutes of 1846 (sec. 58, ch. 103, secs. 3, 4, ch. 165)* until 1927 the laws of Michigan gave the prosecuting attorney but 4 peremptory challenges regardless of the number of defendants being tried. In that year the present act was passed (Act 175, P. A. 1927) providing 5 peremptory challenges for each defendant, and as many times five as the number of defendants jointly tried for the people. As construed by the Michigan Supreme Court this statute represents a violent departure from the settled practice of 80 years or more.

Not only do we feel, therefore, that this new departure of pyramiding the peremptory challenges available to the people was never intended to apply to a trial of 65 defendants jointly, but we further believe that to apply it as the people did to this case cannot constitutionally be done. Inherently, it violates due process and equal protection of the law. In the ordinary case of a trial of 2, 3, or 5 defendants jointly the 10, 15 or 25 peremptory challenges available to the people under such circumstances might well be held not to violate constitutional safeguards, because the greatest advantage the people could have out of such situation would be the right to exclude a limited number of undesirables. But where the people had 325 peremptory challenges as it did here, it would have arbitrary, unrestricted and exclusive control over an indefinite number of jury panels, as here where 300 veniremen were called (R. 86). The jury would ultimately be the jury of the prosecution.

The State Supreme Court hurdled this point by simply stating that the function of peremptory challenges is to reject, not to select.

See Roxborough opinion, 307 Mich., loc. cited, at p. 591.

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* See Appendix B.

The difference between rejection and selection is one of degree. Where the people can reject potentially every one of 300 veniremen called by use of the 325 peremptory challenges available to it, the right of rejection has swelled into an indirect power of selection. So far as petitioner's rights are concerned the jury which tried him was hand-picked by the prosecuting attorney. If as the Michigan Supreme Court states he used only about 100 of his 325 peremptory challenges, it was because he needed no more—all the undesirables, the Negroes, were by that margin already excluded.

Whether a state may or may not constitutionally modify trial by jury or the manner of the selection of the trial jury is not of present importance. What is important, however, is that if it does modify, the new method adopted must be fair and unbiased, and rest within constitutional limitations. A judicial system which requires an accused to be tried by a jury chosen by the prosecuting attorney, as was done in the instant case, is fundamentally deficient in that elemental justice which constitutes due process, or the law of the land.

> "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " Per Hughes, C. J., in Brown v. Mississippi, 297 U. S. 278, 285, 80 L. ed. 682.

Conclusion.

Petitioner was convicted by a jury hand-picked by the prosecuting attorney thru his misuse of the 325 peremptory challenges made available to him by Section 17305, Michigan Compiled Laws of 1929. In addition this jury had the vice that every qualified Negro venireman had been excluded from it by the prosecuting attorney, acting for the people

of the State of Michigan, solely because of race or color. For both reasons his conviction was without due process of law and he was denied the equal protection of the laws as guaranteed him by Section 1 of the 14th Amendment to the Constitution of the United States.

We therefore pray that a writ of certiorari issue from this Court to the Supreme Court of the State of Michigan to review its affirmance of said conviction of petitioner by the Circuit Court for the County of Wayne, in the said State of Michigan, and said court's denial of his application for rehearing, and that the judgment of said Court be reversed on hearing and the cause remanded for further proceedings within the limitations of established constitutional restraints.

Respectfully submitted,

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